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Michigan v. Environmental Protection Agency

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Michigan v. Environmental Protection Agency, 576 U.S. ___, 135 S. Ct. 2699 (2015)

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What's the price of clean air? The Supreme Court found that the EPA, tasked with setting limits on hazardous pollutants, unreasonably declined to consider cost when regulating power plant emissions under the Clean Air Act. 42 U.S.C. § 7412 gives the EPA the authority to regulate power plants under the Clean Air Act as long as the Agency finds that "regulation is appropriate and necessary." In the instant case, the EPA concluded that regulation met both these requirements. Finding the agency's decision unreasonable, the majority struck down the EPA's rule. The minority, however, asserted that the decision was unsound; it overlooked the intent of Congress and will likely have costly repercussions.

I. INTRODUCTION

The petitioners, a group including twenty-three states, brought suit against the Environmental Protection Agency ("EPA").[1] They claimed that the EPA refused to consider cost when making the determination to regulate power plants.[2] *Michigan v. Environmental Protection Agency* examined the current understanding of the EPA's authority to regulate hazardous air pollutants.[3] According to the majority opinion, the issue before the Supreme Court of the United States was whether the EPA unreasonably refused to consider cost when setting power plant emission standards.[4] The EPA is only able to regulate if the action is deemed "appropriate and necessary."[5] However, the EPA must take into account certain relevant factors when making this determination, including the aspect of cost.[6] The Court concluded that the EPA ignored cost and that this was an unreasonable interpretation.[7] In a concurrence penned by Justice Thomas, by contrast, it was the practice of applying *Chevron* deference to agency action itself in question.[8] The dissent found that the majority opinion missed the mark; the concern was if the "EPA acted reasonably in structuring its regulatory process."[9] Delving into the complete regulatory process, the dissent asserted that the EPA did eventually consider cost, even if it was not one of its primary deliberations.[10]

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1 576 U.S.___, 135 S. Ct. 2699 (2015).
2 *Id*. at 2700.
3 *Id*.
4 *Id*. at 2704.
5 42 U.S.C. § 7412(n)(1)(A) (2012).
6 *Mich.*, 135 S. Ct. at 2705.
7 *Id*. at 2711.
8 *Id.* at 2712 (Thomas, J., concurring).
9 *Id*. at 2717 (Kagan, J., dissenting).
10 *Id*.

II. FACTUAL AND PROCEDURAL BACKGROUND

The Clean Air Act ("CAA") charges the EPA with regulating emissions of hazardous air pollutants.[11] Established by the CAA, the National Emissions Standards for Hazardous Air Pollutant Program—also known as the hazardous-air-pollutants program—focuses on stationary-source emissions.[12] However, power plants are held to distinct regulatory requirements under the Clean Air Act Amendments of 1990.[13] The EPA must first conduct a study of any public health risks "reasonably anticipated to occur as a result of emissions by [power plants] of [hazardous air pollutants]."[14] If, after completion of the study, the EPA finds that "regulation is appropriate and necessary," it is given the authority to regulate power plants under 42 U.S.C. § 7412.[15]

The EPA conducted the required study in 1998 and concluded that it had the authority to regulate coal- and oil-fired power plants in 2000.[16] It deemed regulation "appropriate" because of public health and environment risks that may be a consequence of the plants' emissions, and "because controls capable of reducing these emissions were available."[17] The regulation was "necessary" because even after enforcing other CAA conditions, these hazards still existed.[18] Crucially, the EPA stated that when making the determination of whether power plants fell under § 7412 regulation, "costs should not be considered."[19]

The EPA also issued a "Regulatory Impact Analysis," which found that power plants would expend $9.6 billion per year to follow the proposed regulations.[20] Acknowledging that computing the benefits of reducing power plants' emissions of hazardous emissions was not precise, the EPA stated that "to the extent it could, it estimated that these benefits were worth $4 to $6 million per year."[21] Additional benefits, including reducing emissions not under the hazardous-air-pollutants program, were also addressed.[22] While the EPA's "appropriate-and-necessary finding did not rest on these ancillary effects . . . the regulatory impact analysis took them into account, increasing the Agency's estimate of the quantifiable benefits of its regulation to $37 to $90 billion per

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11 *See* 42 U.S.C. §§ 7401-7671q (2012).
12 *Mich.*, 135 S. Ct. at 2704 (majority opinion).
13 *Id*.
14 42 U.S.C § 7412(n)(1)(A).
15 42 U.S.C. § 7412(n)(1)(A).
16 65 Fed. Reg. 79830 (2000).
17 77 Fed. Reg. 9304, 9363 (2012).
18 *Id.*
19 *Id.* at 9326.
20 *Id.* at 9306.
21 *Id.*
22 *Mich.*, 135 S. Ct. at 2705.

year."[23] However, the regulatory impact analysis "played no role" in the EPA's decision to regulate power plants.[24]

Requesting review of the EPA's new rule regarding coal- and oil-fired power plants, the petitioners first brought suit in United States District Court for the District of Columbia.[25] Comprised of twenty-three different states, the Utility Air Regulatory Group, and the National Mining Association, the petitioners disputed the new rule, asserting that the Agency acted unreasonably when it decided to ignore cost. The United States Court of Appeals for the D.C. Circuit affirmed the EPA's decision.[26] The Supreme Court granted certiorari together with two other cases.[27]

III. ANALYSIS

A. Majority Opinion

Federal agencies must employ "reasoned decisionmaking" when issuing new regulations.[28] The Court's opinion, penned by Justice Scalia, focused on whether the complete disregard of the cost of the proposed regulation was reasonable.[29] The Court applied *Chevron* deference, which charges courts with deferring to an agency's expertise and knowledge when that agency is interpreting ambiguous legislation.[30] *Chevron* deference does not, however, give an agency license to issue arbitrary or unreasoned decisions.[31] The Court found that in this case, the EPA "strayed far beyond those bounds when it read § 7412(n)(1) to mean that it could ignore cost when deciding whether to regulate power plants."[32]

The Court determined that treatment of power plants diverges from the CAA's management of other sources.[33] The CAA gives the EPA the authority to regulate power plants if the EPA determines regulation to be "appropriate and necessary" under § 7412(n)(1)(A), while directing with set criteria the regulation of other sources.[34] Justice Scalia found that though the phrase "appropriate and necessary" left much room for agency interpretation, the EPA's understanding

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[23] 77 Fed. Reg. 9306.

[24] Brief for Fed. Resp'ts at 14, *Mich. v. Envtl. Prot. Agency*, 135 S. Ct. 2699 (2015) (Nos. 14-46, 14-47, 14-49).

[25] *Mich.*, 135 S. Ct. at 2706.

[26] White Stallion Energy Ctr., LLC v. Envtl. Prot. Agency, 748 F.3d 1222 (D.C. Cir. 2014) (per curiam).

[27] *See* Util. Air Regulatory Grp. v. Envtl. Prot. Agency, No. 14-47, ___ U.S. ___ (2015); Nat'l Mining Ass'n v. Envtl. Prot. Agency, No. 14-49, ___ U.S. ___ (2015).

[28] Allentown Mack Sales & Serv., Inc. v. Nat'l Labor Relations Bd., 522 U. S. 359, 374 (1998).

[29] *Mich.*, 135 S. Ct. at 2706.

[30] Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U. S. 837 (1984).

[31] *Mich.*, 135 S. Ct. at 2706-07.

[32] *Id*.

[33] *Id*. at 2705.

[34] *Id*.

went too far.[35] The majority further found that levying regulations that would cost power plants billions of dollars to save "a few dollars in health or environmental benefits" was illogical, and far from appropriate.[36] The Court acknowledged that there may be some situations in which it is reasonable not to consider cost under the phrase "appropriate and necessary," but stated that "this is not one of them."[37] The Court determined that cost, an important factor in the decisions of other agencies, should certainly be considered by EPA in regulating coal- and oil-fired power plants.[38]

The Court took particular offense to the EPA's interpretation of § 7412(n)(1)(B), which had concluded that Congress intended attention be given to environmental effects but not to cost.[39] *Chevron* deference, the Court held, does not stretch that far; while agencies may adopt one reasonable interpretation of a statute even though an equally reasonable alternative exists, *Chevron* "does not license interpretative gerrymanders under which an agency keeps parts of statutory context it likes while throwing away parts it does not."[40] Ancillary benefits, addressed in a Regulatory Impact Analysis, were not enough to uphold the EPA's decision, as the EPA did not use those additional benefits as a basis for its decision, and therefore the Court could consider those benefits in its holding.[41] Comparing the EPA's reasoning to a Ferrari buyer who purchases the vehicle with no thought towards cost because that deliberation will happen "later when deciding whether to upgrade the sound system," the Court reversed and remanded, concluding that the EPA's interpretation of § 7412(n)(1)(A) as omitting cost analysis was unreasonable.[42]

B. Justice Thomas's Concurrence

The issue in the case for Justice Thomas was the application of *Chevron* deference.[43] In Justice Thomas's view, applying this standard of review takes the authority to interpret the law away from the courts and instead allows agencies to make their own determinations.[44] To Justice Thomas, indirectly, vaguely worded statutes allow agencies "to formulate legally binding rules to fill in gaps based on policy judgments" and bypass both Congress and the courts.[45] Justice Thomas asserted that this practice conflicts with Article I of the United States Constitution, which imbues Congress with "all legislative Powers."[46] Justice

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35 *Id*.
36 *Id*. at 2702.
37 *Id*.
38 *Id*.
39 *Id.* at 2708.
40 *Id*.
41 *Id*. at 2709.
42 *Id*.
43 *Id.* at 2712 (Thomas, J., concurring).
44 *Id.* at 2713.
45 *Id*. at 2713.
46 U.S. Const., art I., § 1.

Thomas found the EPA's belief that it was entitled to deference distressing, and courts should be wary of this practice, as "it is the power to decide—without any particular fidelity to the text—which policy goals EPA wishes to pursue."[47]

C. Justice Kagan's Dissenting Opinion

The dissent argued that the majority opinion mistakenly rested its rejection of the rule on the fact that the EPA did not overtly examine costs in the primary step of the regulatory process.[48] The dissenting justices asserted that they would agree with the Court's ruling if the EPA had actually and unequivocally ignored cost.[49] However, they emphasized that while the analysis did not occur in the primary step of its deliberations, the EPA undoubtedly did consider cost.[50] Finding that not only did the EPA take an exhaustive and thorough look at costs, the dissent further stressed that the EPA "could not have measured costs at the process's initial stage with any accuracy" due to the nature of the process.[51] While this process begins with the determination that regulation is "appropriate and necessary," from there the EPA establishes emission limitations, an extensive procedure that takes years and examines cost.[52] The dissent, asserting the EPA was reasonable in their consideration of the costs, comprehensively examined the regulatory process.[53] The dissent found that at the end of this process, the EPA concluded that the advantages of the rule "far outweigh the costs."[54] Among other highlighted benefits, the EPA estimated there would be between 4,000 and 11,000 fewer premature deaths caused by hazardous air pollutants annually if the rule were implemented.[55]

According to the dissent, the only question was if the EPA reasonably organized this process.[56] The dissenting justices concluded that the EPA's process made logical sense, and due to the plethora of factors meriting consideration under § 7412(n)(1), it was reasonable for EPA to break up the stages of its analysis to consider factors separately.[57] Stating that the main defect in the majority's opinion was that "it ignores everything but one thing EPA did," the dissent recast the majority's Ferrari metaphor.[58] Instead of an irrational car purchaser who buys without checking the price, the dissent characterized the EPA as more like a car owner who determines "that it is 'appropriate and necessary' to replace her worn-out brake pads," and when "faced with a serious

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47 *Id*. at 2713 (Thomas, J., concurring).
48 *Id*. at 2714 (Kagan, J., dissenting).
49 *Id*.
50 *Id*.
51 *Id*. at 2715.
52 *Id*. at 2717.
53 *Id*. at 2718.
54 77 Fed. Reg. 9306.
55 *Id*. at 9429.
56 *Mich.*, 135 S. Ct. at 2717 (Kagan, J., dissenting).
57 *Id*. at 2722.
58 *Id*. at 2724.

hazard and an available remedy, EPA moved forward like the sensible car owner, with a promise that it would, and well-grounded confidence that it could, take costs into account down the line."[59]

IV. CONCLUSION

Though this case presents a setback for the EPA, it remains tasked with regulating hazardous-air pollutants produced from power plants. However, it must now adequately address costs in the first stages of determining if regulation is "appropriate and necessary." Justice Thomas's attack on *Chevron* deference, however, seems unlikely to gain significant traction, though, as this case demonstrates, *Chevron* deference to agency decisions may be growing less generous. The likely repercussions envisioned by the dissent focus not on judicial review, but environmental reality, and in doing so take a far darker turn. If this foreseen future comes to fruition, "the result is a decision that deprives the American public of the pollution control measures that the responsible Agency, acting well within its delegated authority, found would save many, many lives."[60]

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[59] *Id*. at 2725.
[60] *Id*. at 2726.